

229204

BAKER & MILLER PLLC

ATTORNEYS and COUNSELLORS
2401 PENNSYLVANIA AVENUE, NW
SUITE 300
WASHINGTON, DC 20037
TELEPHONE (202) 663-7820
FACSIMILE (202) 663-7849

William A. Mullins

Direct Dial: (202) 663-7823
E-Mail: wmullins@bakerandmiller.com

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VIA ELECTRONIC FILING

Cynthia T. Brown
Chief of the Section of Administration, Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423-0001

ENTERED
Office of Proceedings

APR 12 2011

Part of
Public Record

Re: *Competition in the Railroad Industry*,
STB Docket No. EP 705

Dear Ms. Brown:

In accordance with the Board's decisions served on January 11 and February 4, 2011, Four Rivers Transportation, Inc., hereby tenders its initial comments in the above-captioned proceeding.

If there are any questions concerning this filing, please contact me at the address and phone listed above or at wmullins@bakerandmiller.com.

Respectfully submitted,



William A. Mullins

cc: J. Thomas Garrett

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB DOCKET NO. EP 705

COMPETITION IN THE RAILROAD INDUSTRY

**INITIAL COMMENTS OF
FOUR RIVERS TRANSPORTATION, INC.**

**William A. Mullins, Esq.
Robert A. Wimbish, Esq.
Baker & Miller PLLC
2401 Pennsylvania Ave., N.W.
Suite 300
Washington, DC 20037
Telephone: (202) 663-7823
Facsimile: (202) 663-7849**

**Attorneys for Four Rivers
Transportation, Inc.**

Dated: April 12, 2011

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB DOCKET NO. 705

COMPETITION IN THE RAILROAD INDUSTRY

**INITIAL COMMENTS OF
FOUR RIVERS TRANSPORTATION, INC.**

Pursuant to the Board's notice served on January 11 and its supplemental decision served on February 4, 2011 (respectively, the "January 11 Notice" and the "February 4 Decision"), Four Rivers Transportation, Inc. ("Four Rivers") hereby offers its initial comments in connection with the above-captioned proceeding. The Board has stated that the purpose of this proceeding is to "explore the current state of competition in the railroad industry and possible policy alternatives to facilitate more competition, where appropriate." January 11 Notice at 1. As such, Four Rivers understands that the Board, at this time, is not advancing a particular change or modification of its existing approaches to resolving rate and service complaints. Yet, during this proceeding, there will be many who will advocate that the Board should adopt changes, including requiring publication of a bottleneck rate upon request or reducing the standards by which one carrier can access the traffic of another carrier through reciprocal switching or terminal access. The Board should resist the calls for such a radical change in existing precedent. Indeed, to significantly alter the status quo could result in extensive and unanticipated harm to railroads, especially carriers that are much smaller than the largest of the Class I carriers.

It is precisely because of the harms that smaller railroads could suffer if certain alleged "competition enhancing" policies were to be embraced by this agency that has made Four Rivers

keenly interested in this proceeding. The Board has stated that it will consider adjusting its policies only "where appropriate," and, for the reasons discussed below, Four Rivers wishes to make clear that there should be no changes in existing procedures and precedents, but if the Board does consider making any changes, such proposed changes need to account for the vast differences between the largest Class I carriers and smaller railroads.

BACKGROUND

Four Rivers is a privately-held non-carrier holding company which directly and indirectly controls both rail and non-rail subsidiaries. Four Rivers currently controls three common carriers subject to the Board's jurisdiction (hereinafter, the "Four Rivers Railroads"): Paducah & Louisville Railway, Inc. ("P&L"), Evansville Western, Inc. ("EVWR"), and Appalachian and Ohio Railway, Inc. ("A&O"). P&L is a Class II common carrier railroad that owns and operates approximately 262 miles of rail line, all of which is located within the Commonwealth of Kentucky. EVWR is a Class III common carrier railroad that operates approximately 124 miles of rail line in Illinois and Indiana. A&O is a Class III common carrier railroad that leases and operates over 158 miles of rail line, all of which is located within West Virginia.

Each of the Four Rivers Railroads is a relatively small railroad serving distinct and important transportation roles typical of many other smaller rail carriers. As is the case with smaller carriers across the country, most of the traffic handled by each of the Four Rivers Railroads does not usually originate *and* terminate on that carrier. Rather, each of the Four Rivers Railroads either originates *or* terminates most traffic it handles. As such, they depend upon their much larger Class I railroad interchange partners to meet the line-haul needs of their customers and to access markets well beyond the limited reach of each of the Four Rivers Railroads' regional operations. Also, the Four Rivers Railroads, like every other short line and

regional carrier, provide essential rail transportation services too many communities, who absent the existence of the short line railroad, would have lost rail service completely, subsequently losing industries who would have gone out of business or forced to relocate to a region with rail service. Furthermore, given their lower cost structure and flexible service abilities, the Four Rivers Railroads are also able to compete effectively with other modes of transportation, such as trucks and barges. Just as important, shippers benefit from the Four Rivers Railroads' access to multiple Class I line haul options, and, in the case of P&L and EVWR, to its access to barge carriers.

Given the obvious geographic limitations of their own systems, the Four Rivers Railroads cannot compete against the far-flung Class I systems with which they connect, and with which the Four Rivers Railroads interchange the traffic that each either originates or terminates. This interdependency allows the Class I carriers to focus on what they do best -- providing long haul service in large blocks of unit trains -- while allowing the Four Rivers Railroads to be "feeder railroads" to the Class I's by focusing on short haul truck or barge competitive movements, switching services, direct plant access for loading and unloading, car storage, and providing specified service needs. In short, as carriers that typically serve either as terminating or originating carriers -- but rarely as both -- the Four Rivers Railroads cannot envision any scenario under which they or their customers would gain any long-term benefit from changes to STB regulations or policies that would make it easier for other railroads, especially other Class I's, to access their traffic base through enhanced terminal access or reciprocal switching or to require them to provide a short haul bottleneck rate. Instead, Four Rivers has reason to believe that any such misguided and over-generalized efforts would merely diminish the ability of smaller

railroads to compete effectively against other transportation modes, reinvest in its rail physical plant as its shippers would want, and to provide effective feeder line service to the larger carriers.

COMMENTS

In its January 11 Notice, the Board stated its particular interest in discussion focusing upon any or all of the following topics: (1) the financial state of the railroad industry; (2) 49 U.S.C. § 10705 (alternative through routes); (3) 49 U.S.C. § 11102(a) (terminal facilities access); (4) 49 U.S.C. § 11102(c) (reciprocal switching agreements); (5) bottleneck rates; (6) competitive access pricing; and (7) the positive and negative impact any proposed change would have on the railroad industry, the shipper community, and the economy as a whole. It is not the intent of Four Rivers in these comments to specifically address each and every element, but rather to provide a general overview its thoughts and concerns at this stage of the proceeding.¹ Simply put, Four Rivers does not support any changes to Board policy on any of the first six issues above, especially if those changes would allow smaller carriers to be targeted in ways that will only undercut their respective abilities to provide essential services to customers, to reinvest in their railroads, and to compete against other modes of transportation.

Unless the Board continues properly to distinguish between the larger Class Is and smaller carriers,² any new policies or regulations that it may adopt would end up throwing the

¹ Four Rivers notes that comments are being filed by the American Short Line and Regional Railroad Association, of which its railroad subsidiaries are members, and in which comments they join in support.

² The Board, its predecessor (the Interstate Commerce Commission – “ICC”), transportation experts, and even Class I railroads and shipper interests have long recognized the critical distinctions between the larger Class I carriers and smaller railroads. See, e.g., Review o Rail Access and Competition Issues – Renewed Petition of the Western Coal Traffic League, STB Ex Parte No. 575, STB Ex Parte No. 575 (Sub-No. 1) (STB served October 30, 2007) (discussing at great length the distinctions between larger and smaller railroads, and the public benefits delivered by smaller carriers); National Grain Car Supply Conference, Creighton University School of Law, Omaha, Nebraska, 10 I.C.C. 2d 479 (1994), 1994 MCC LEXIS 146, *181

baby out with the bathwater, and penalize numerous smaller carriers in the interest of appeasing a certain handful of vocal shippers and shipper groups that wish to have this agency intervene in the marketplace to these shippers' advantage. Four Rivers believes that the Board does not intend through this proceeding to target smaller railroads, to erode their important role in the nation's interstate rail network, or, for that matter, to jeopardize the ability of smaller carriers to continue to fulfill their specialized roles or to reinvest in their respective physical plants.

Although Four Rivers believes that the Board does not intend to victimize smaller carriers through this proceeding, the Board has not to this point clarified as a matter of policy whether it would indeed deal differently with smaller railroads on any or all of the first six enumerated topics included in its Notice by, for example, excluding smaller carriers from policy or regulatory changes that involve any of the above-enumerated discussion topics. Four Rivers strongly encourages the Board to make it clear that this Board does not intend to jeopardize the financial health of the short line industry by adopting rules and policies, such as those advocated by some shipper groups that would apply the same rules and procedures to all carriers regardless of size, scope, and market power.

The Board can and must make important and necessary distinctions between smaller railroads and the largest Class I carriers if it should depart from long-standing agency policies that have facilitated the growth and success of the industry in general. In short, the Board has

(comparing short line railroads to other customers of Class I railroads in matters of car supply); Montana Rail Link, Inc. and Wisconsin Central, Ltd. – Joint Petition for Rulemaking with Respect to 49 C.F.R. Part 1201, 8 I.C.C. 2d 625 (1992), 1992 ICC LEXIS 112, *5 (in revising the agency's carrier classification rules, the ICC noted that proponents of such rules revision asserted – evidently persuasively – that regional carriers are more akin to short lines than to trunk line carriers, in that, among other things, “regional railroads serve a discrete geographical area[, and] are highly dependent on their class I connections”); see also Tom Murray, “A Different Way to Run a Railroad: Regional Versus Network Carriers,” J. of Transp. Law, Logistics and Policy (Vol. 71, No. 3, Spring 2004).

not yet set any necessary boundaries in the interest of protecting smaller carriers from shippers that might seek in the interest of short-term advantage to invoke new Board policy to wrest unfair concessions from smaller carriers. Yet no discussion of this subject would be complete without specific attention to the applicability of Board policy changes or new regulations to smaller carriers (if any).

Turning briefly to the enumerated discussion topics in the Board's Notice, Four Rivers first observes that the very first item (the financial state of the railroad industry) seems particularly focused upon those carriers for which the Board and the public have the greatest amount of financial data – the Class I railroads. Moreover, Four Rivers is deeply troubled by the underlying implication of this topic, namely discussion that could turn toward an agency-mandated redistribution of wealth and resources between shippers on one side and railroads (including smaller railroads) on the other merely because large railroads may be enjoying some of their best years of late financially. In the case of the Four Rivers Railroads, as with any railroad, their present and future ability to attract capital depends upon sustained success.

For example, the Four Rivers Railroads face major capital expenditures in the upcoming years, including substantial costs associated with rehabilitating and replacing certain "big ticket" infrastructure. In particular, P&L is facing multi-million dollar expenses to replace two bridges – the so-called Muldraugh Bridges on P&L's main line route in Kentucky. Because P&L may have to fund this bridge project entirely on its own or seek abandonment of the line, it is essential that P&L has a revenue stream and an adequate return on its investments to justify such major capital expenditures. Any "adjustment" in the Board's competition policies at the expense of smaller carrier financial success will hinder or prevent smaller carriers from obtaining capital and reinvesting in their rail physical plants and, in the end will harm shippers that depend upon

these smaller carriers. Finally, under a regime where smaller carriers are impeded unfairly in their efforts to earn adequate revenues to fund necessary capital improvements, smaller carriers will be forced either to cut back on service, abandon rail lines, or plead for government subsidy to continue operation.

Nor would potential changes with respect to the above-enumerated topics 2 (alternative through routes) and 5 (bottleneck rates) have a positive impact on Four Rivers. Indeed, it is unclear how the Board would even apply such proposed changes to short lines. Like other short lines, P&L and EVWR actually connect with more than one Class I carrier, but perhaps unlike others, they also have independent pricing authority, for the most part, and have very little, if any, restrictions on their ability to interchange with connecting carriers.³ This allows them to provide their shippers with multiple routing and pricing options. As a result, there is no need for the Board to prescribe an alternative through route for shippers located on the P&L and EVWR, certainly not without a showing of anti-competitive conduct through an abuse of market power, as is the current standard.⁴

With respect to bottlenecks, the Four Rivers Railroads, like smaller railroads everywhere, are hardly the quintessential bottleneck carriers, since they generally do not provide service from origin to destination. Perhaps upwards of 85-90% of traffic on the Four Rivers Railroads is

³ As for A&O, it only connects with one carrier and at only one interchange point. As such, it would be physically impossible to include them in a prescribed alternative route.

⁴ In Entergy Arkansas, Inc. & Entergy Services, Inc. v. Union Pacific Railroad Company, Missouri & Northern Arkansas Railroad Company, Inc. & BNSF Railway Company, Docket No. 42104 (STB served March 15, 2001) (“Entergy”), the Board suggested an alternative standard pursuant to which Section 10705 relief might be available if a party could establish that the prescribed through-route was “better” or “more efficient,” in lieu of showing anti-competitive conduct. Entergy at 7, citing Central Power & Light Co. v Southern Pac. Transp. Co., 1 S.T.B. 1059 (1996), aff’d sub nom. MidAmerican Energy Co. v STB, 169 F.3d 1099 (8th Cir. 1999). Four Rivers does not support applying a “better” or “more efficient” standard when prescribing alternative through routes involving short lines.

interchange traffic, and even then, although EVWR and P&L are fortunate to have more than one Class I carrier to interchange with and the interchange locations with Class I carriers are few and far between. As such, it is difficult to envision how the bottleneck principles would even apply.

However, if the Four Rivers Railroad were required to provide a bottleneck rate, which such a bottleneck rate would in most instances constitute either the entire length of the railroad, or in a few cases, a short haul route, and that bottleneck rate were set at a prescribed rate rather than determined through marketplace discussions, and depending upon the level of contribution that it would be entitled to recover as part of the prescribed rate, the Four River Railroads could suffer a substantial revenue loss. Such a loss would significantly reduce the available revenues for maintenance, infrastructure rehabilitation, and future capital improvements on the entire rest of the network. Likewise, to the extent the bottleneck rate was to a short haul interchange point, this short haul route would likely result in operating difficulties and inefficiencies as it is probable that the forced "bottleneck interchange" would not occur at a location where the short line currently interchanges traffic.

Moreover, Four Rivers fails to understand why the Board's current bottleneck policies need to be changed. For example, to the extent a connecting Class I carrier provides a contract to a shipper from the point of interchange with a Four Rivers' railroad to the ultimate origin or destination, or such a connecting Class I carrier refuses to enter into a joint through rate and publishes a rate for just its portion of the move, the Four Rivers short line carrier is already required to provide a "bottleneck rate" (Rule 11) rate for just its portion of the route (i.e. from the shipper location to the interchange point with the Class I carrier). This Rule 11 rate covering just the move on the short line, to the extent it is not itself subject to a contract, is then subject to a rate complaint – either as part of a rate challenge to the entire origin to destination rate, or to the

extent the connecting Class I carrier has given a contract rate, it is subject to rate challenge on just the short line rate itself. Accordingly, any shipper should be required to present a convincing case that the existing procedures are inadequate before the Board should consider changing its procedures to require short line carriers to provide bottleneck rates upon request and to any interchange location, especially when there has been no finding that the short line is abusing market power or otherwise engaging in anti-competitive conduct.

With respect to terminal facilities access and reciprocal switching agreements, Four Rivers believes that any adjustment of current policies on either front would do nothing but encourage larger carriers to try to wrest the more profitable traffic from smaller railroads, i.e. skim the cream off the top, and thereby leaving smaller railroads financially weaker and less robust competitors to other modes of transportation or the Class I's themselves. In short, Four Rivers cannot conceive of any adjustment in current Board policy on either subject that would do anything other than jeopardize the financial status of every smaller carrier lacking the network scope of the larger Class Is.

On that note, Four Rivers fails to understand how smaller carriers, such as those it controls, would have a role in any potential competitive access pricing dialogue. There are very few, if any, cases that Four Rivers can envision where the smaller carrier could "skim the cream" off the Class I carrier by being the initiator of any competitive access effort, since it will generally lack the ability to offer line-haul services that a shipper would want in lieu of those provided by an undesirable incumbent Class I carrier. If anything, carriers such as the Four Rivers Railroads would likely be the target of "competitive access" poaching by larger carriers that would thereby sap the smaller carriers of their sustaining revenues and traffic base. Four Rivers has yet to see how any "competitive access" pricing system would apply fairly to smaller

carriers, and how such a pricing system would not radically alter the dynamics of, and as a result imperil, the short line and regional railroad industry as it exists today.

It is, of course, too early for Four Rivers to opine on the positive or negative impacts of any specific proposal until such specific proposals are offered. As should be clear from the preceding discussion, however, Four Rivers has no reason to believe that adjustments to existing Board policy will do anything but harm smaller carriers, particularly if the Board fails to make necessary distinctions between the largest Class Is and smaller carriers. Four Rivers will monitor this proceeding carefully, and will offer reply comments as appropriate in response to any specific proposal that may be advanced by another interested party, and it will pay keen attention to whether or not anyone advocating policy changes are responsible enough in their proposals to account for the important and fundamental differences between the largest Class I railroads and smaller carriers such as the Four Rivers Railroads.

Finally, Four Rivers perceives the ongoing debate over rail competition issues as one largely played out between the four largest Class I railroads and larger shippers and shipper associations. As Four Rivers sees it, smaller carriers are as a group invariably overlooked in this debate – one that may not be the intended target of shipper efforts, but one that frequently must speak up to defend against being grouped with the larger carriers that they do not resemble in many respects. Four Rivers understands that many shippers do indeed understand and appreciate the fundamental differences between larger carriers and smaller ones, and yet, unfortunately, there is insufficient distinction between the very large Class I's and smaller railroads in existing Board policy or in shipper arguments for rail competition policy change. But we believe that smaller railroads would welcome a constructive dialogue with shippers to discuss Board policies, and in which specific understandings concerning rail competition issues possibly could be

reached. Because shippers seeking a departure from existing Board policy have not engaged in direct consultation with smaller railroads on this issue, it is not surprising that smaller carriers view some of the shipper proposals with trepidation. In fact, in the absence of such direct dialogue among shippers and smaller railroads, Four Rivers submits that this proceeding is premature and will not be as constructive as it can and should be.

CONCLUSION

In its January 11 Notice initiating this proceeding, the Board indicated that it will evaluate its competition policies and any proposals to adjust those policies with great caution. Such a measured approach to a very complicated, multi-faceted issue is, of course, exceedingly wise, because, in Four Rivers' view, any changes are likely to yield far more harm than good. Unfortunately, Four Rivers is concerned that those who may advocate for change, motivated as they likely will be by the possibility of a short-term redistribution of resources, will be anywhere near as cautious in their approaches to the issue as the Board will be.

Four Rivers believes that those who want the Board to abandon its current competition policies (which policies, incidentally, have fostered a robust and highly competitive rail transportation industry, and one in which smaller carriers can thrive) probably understand the fundamental differences in the roles played by the largest of the Class I's and smaller carriers, even if they do not always acknowledge the distinctions. Such proponents of change may not always fully comprehend how their industry-wide proposals would harm smaller carriers. In fact, Four Rivers believes that many urging the Board to depart from existing policies do not mean to target or to harm to smaller carriers. We hope that shippers arguing for policy changes will not gloss over the critical distinctions among larger and smaller rail carriers, and will not opt to paint a picture of the railroad industry with overly large brush strokes

Indeed, it is possible that certain parties urging changes in Board policy – perhaps even the Board itself – may be inclined to make assurances that policy changes occasioned by this proceeding are not intended to apply to, and will not be used to the detriment of, smaller carriers. While Four Rivers believes that such general assurances may emerge here, it must take a “trust but verify” outlook. Specifically, there can be no assurance of appropriate safe havens for smaller carriers against the possible collateral damage of Board policy shifts unless those safe havens are specifically reflected in shipper proposals or in Board statements of policy. So, while Four Rivers does not believe any Board policy changes to existing policies and precedents are appropriate, it is certain to recognize and to oppose proposals that fail to account for the important distinctions between larger and smaller carriers.

Four Rivers urges the Board to take a measured approach on the subjects of this proceeding. When doing so, the Board, as part of that approach, needs to consider the extent to which larger and smaller railroads differ, and the manner in which they compete and cooperate with one another and with other modes, and then, to the extent any changes are made, account for those differences. We look forward to participating further in this proceeding as necessary.

Respectfully submitted,



William A. Mullins, Esq.
Robert A. Wimbish
Baker & Miller PLLC
2401 Pennsylvania Ave., N.W.
Suite 300
Washington, DC 20037
Telephone: (202) 663-7823
Facsimile: (202) 663-7849

Attorneys for Four Rivers Transportation, Inc.

Dated: April 12, 2011